

## WHY ADOPTIONS ARE STILL ESSENTIAL FOR LESBIAN AND GAY COUPLES IN CALIFORNIA (AND MASSACHUSETTS AND VERMONT TOO)

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In the last few years, several states have passed laws that recognize lesbian and gay families as just that: families. Domestic partnerships in California and civil unions in Vermont provide that children born into the partnerships will be treated as the children of both members of the couple. Because of these progressive state laws, lesbian couples giving birth in California, Massachusetts, and Vermont can get original birth certificates showing both partners' names instead of only the name of the birth mother. This is a huge victory for lesbian families, and is cause for celebration.

But, as with so many such things, there's a catch. The federal Defense of Marriage Act (DOMA), 28 USC 1738C, says: "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship." To the extent that a claim of parentage "arises from" a same-sex domestic partnership, civil union, or marriage, it is almost certain that the federal government and other states will be free to disregard such claims – in fact, this has already happened in Virginia, where a judge ignored the legal parentage of a child born into a Vermont civil union.

In *Miller-Jenkins v. Miller-Jenkins*, the State of Virginia refused to recognize the parental rights of the non-biological mother of a child born to a lesbian couple who entered into a civil union in the State of Vermont before the child's birth. The Virginia court refused to acknowledge the parent-child relationship despite the fact that the child was born into an intact Vermont civil union and a Vermont court had made appropriate custody and child support determinations and still had jurisdiction over the case.

The Virginia court in *Miller-Jenkins* stated that: "Any claim of parentage

by Respondent [the non-biological mom] under Vermont law is necessarily based on Respondent's civil union with petitioner. For the UCCJEA [Uniform Child Custody & Jurisdiction Enforcement Act] to preclude the exercise of jurisdiction by this Court, Respondent must be a 'person acting as a parent,' which the UCCJEA defines as any person other than a parent who 'claims a right to legal custody under the laws of this Commonwealth.' . . . Here, Respondent cannot claim a right to legal custody under the laws of this Commonwealth as her claims are based on rights under Vermont's civil union laws that are null and void under Va. Code § 20-45.3 [the Virginia DOMA]."

The Vermont civil union law provides that the "rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage." This language is almost identical to that of the California domestic partnership law, and provides equivalent benefits as those provided by a Massachusetts marriage. Yet, it did not protect the Miller-Jenkins child from the loss of one of her parents in a homophobic state.

Even more worrisome is the prospect of the federal government refusing to recognize parentage based on same-sex marriages, civil unions, or domestic partnerships even when there is no conflict between the parents. Picture this: your partner – who is the non-biological mother of your child – dies of cancer when your child is only 3 years old. Your partner was the primary breadwinner for your family. You know that you will not be eligible for Social Security survivor benefits because the federal government does not recognize your union, but you always assumed that your child would be, because you have a birth certificate showing both of you as parents. Enter the federal DOMA – and all of a sudden you have the federal government denying Social Security benefits to your child, too, on the grounds that your deceased partner's claim of parentage "arises from" a marriage-like relationship denied recognition by DOMA. Or imagine an IRS audit resulting in denial of your partner's claim of your child as an exemption. Or

imagine the Department of Homeland Security refusing to issue your child a passport with your partner listed as a parent. You get the idea....

But there is a way to avoid these horrible results: adoption. In Massachusetts, Vermont, and California, lesbian and gay couples are able to complete adoptions (often called second-parent, co-parent, or domestic partner adoptions) to formalize their parental relationships with their partners' adopted or biological children. In this way, they can create a legal parent-child relationship that is not dependent on their adult status as domestic partners or spouses. This simple protection is the best guarantee that parent-child relationships in lesbian and gay families will be respected.

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